

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL,)	No. C-04-04448 SC
INC., COMMITTEE TO BRIDGE THE GAP,)	
and CITY OF LOS ANGELES,)	
)	ORDER GRANTING
Plaintiffs,)	FEDERAL DEFENDANTS'
)	MOTION TO ALTER OR
)	<u>AMEND JUDGMENT</u>
v.)	
)	
DEPARTMENT OF ENERGY, SPENCER)	
ABRAHAM, Secretary, Department of)	
Energy, and CAMILE YUAN-SOO HOO,)	
Manager, National Nuclear Security)	
Administration, Oakland Operations)	
Office,)	
)	
Defendants.)	

I. INTRODUCTION

Now before the Court is the motion by the Department of Energy, et al. ("Federal Defendants") to alter or amend the Court's May 2, 2007 Order Granting Plaintiffs' Motion for Summary Judgment, ("Summary Judgment Order", Docket No. 66) and the Court's May 3, 2007 Judgment ("Judgment", Docket No. 67). See Mot., Docket No. 70. The Federal Defendants argue that the Court's award of attorneys' fees and costs was inappropriate because the Judgment was not final and unappealable, and because the Plaintiffs had not demonstrated that they meet the eligibility requirements imposed by the Equal Access to Justice Act ("EAJA", 28 U.S.C. § 2412). Id. Plaintiffs Natural Resources Defense

1 Council and Committee to Bridge the Gap (together referred to as
2 the "Organizational Plaintiffs")¹ opposed the motion, and the
3 Federal Defendants replied. See Docket Nos. 72, 73.

4 Having reviewed the parties' arguments, the Court concludes
5 that the award of attorneys' fees and costs was inappropriate, and
6 therefore GRANTS the Federal Defendants' Motion to Alter or Amend
7 Judgment.

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9 **II. LEGAL STANDARD**

10 Pursuant to Rule 59 of the Federal Rules of Civil Procedure,
11 "the district court has the discretion to reopen a judgment if one
12 has been entered, take additional testimony, amend findings of
13 fact and conclusions of law or make new findings and conclusions."
14 Defenders of Wildlife v. Bernal, 204 F.3d 920, 928-29 (9th Cir.
15 2000). While the court has considerable discretion in considering
16 motions brought under Rule 59(e), there are at least four reasons
17 the court may grant such a motion: 1) to correct a manifest error
18 of law or fact upon which the judgment is based; 2) to present
19 newly discovered or previously unavailable evidence; 3) to prevent
20 manifest injustice; and 4) to account for an intervening change in
21 the controlling law. See Haskell v. State Farm Mut. Auto. Ins.
22 Co., 187 F. Supp. 2d 1241, 1244 (D. Haw. 2002).

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25 ¹In addition to the Organizational Plaintiffs, the City of Los
26 Angeles ("City") is a plaintiff in this action. Neither the
27 Summary Judgment Order nor the Judgment distinguished between the
28 Organizational Plaintiffs and the City in holding that Plaintiffs
were entitled to recover attorneys' fees and costs. The City did
not participate in the briefing of the present motion.

1 **III. DISCUSSION**

2 The Federal Defendants contend that the Court prematurely
3 awarded attorneys' fees and costs, and in so doing, committed
4 legal error. See Mot. at 4. The Federal Defendants further argue
5 that the award of damages was in error because the Plaintiffs have
6 the burden of establishing their eligibility to recover, which
7 they have not yet done. Id.

8 For the United States to be sued, Congress must include in
9 the text of a statute a clear, unequivocal, specific statement of
10 consent. See United States v. Nordic Village, Inc., 503 U.S. 30,
11 37 (1992) ("[T]he 'unequivocal expression' of elimination of
12 sovereign immunity that we insist upon is an expression in
13 statutory text."). Where Congress has included a waiver of
14 sovereign immunity in a statute, such waiver must be strictly
15 construed. See id. at 34.

16 The Organizational Plaintiffs rely on the EAJA as a basis for
17 recovery of costs and attorneys' fees. See Stipulation to Enlarge
18 Time to File A Motion Concerning Attorneys' Fees and Costs, Docket
19 No. 69. The EAJA provides:

20 [A] court shall award to a prevailing party other than
21 the United States fees and other expenses, in addition
22 to any costs awarded pursuant to subsection (a),
23 incurred by that party in any civil action (other than
24 cases sounding in tort), including proceedings for
25 judicial review of agency action, brought by or against
26 the United States in any court having jurisdiction of
27 that action, unless the court finds that the position of
28 the United States was substantially justified or that
 special circumstances make an award unjust.

26 28 U.S.C. 2412(d)(1)(A). A party seeking an award of fees and
27 other expenses shall submit an application to the court within

1 thirty days following a final judgment. Id. § 2412(d)(1)(B).
2 Under the EAJA, a "party" is "any partnership, corporation,
3 association of local government, or organization, the net worth of
4 which did not exceed \$7,000,000 at the time the civil action was
5 filed, and which had not more than 500 employees at the time the
6 civil action was filed." Id. § 2412(d)(2)(B)(ii). The net worth
7 limit does not apply to organizations exempt from taxation under
8 26 U.S.C. §501(c)(3). Id.

9 Thus, in addition to prevailing on their original lawsuit and
10 receiving a final, unappealable verdict, the Organizational
11 Plaintiffs must also file a timely claim for costs and attorneys'
12 fees, prove their eligibility to recover under the EAJA, prove
13 that the Federal Defendants' position was not substantially
14 justified, and prove the absence of "special circumstances." See
15 Sullivan v. Hudson, 490 U.S. 877, 883 (1989).

16 **A. Final Judgment**

17 A party seeking to recover costs or fees under the EAJA must
18 submit an application within thirty days of final judgment. 28
19 U.S.C. § 2412(d)(1)(B). "Final judgment" is defined as "a
20 judgment that is final and not appealable, and includes an order
21 of settlement." Id. § 2412(d)(2)(G). The thirty-day period for
22 filing an application to recover costs or attorneys' fees under
23 the EAJA does not begin to run until the time for the Government
24 to file a notice of appeal has expired. See Melkonyan v.
25 Sullivan, 501 U.S. 89, 96 (1991) ("Accordingly, we hold that a
26 'final judgment' for purposes of 28 U. S. C. § 2412(d)(1)(B) means
27 a judgment rendered by a court that terminates the civil action
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1 for which EAJA fees may be received. The 30-day EAJA clock begins
2 to run after the time to appeal that 'final judgment' has
3 expired.").

4 The thirty-day period established in the EAJA is an outer
5 limit, however. The statute does not require a prevailing
6 plaintiff to wait for that period to expire before applying for
7 fees. See Shalala v. Schaefer, 509 U.S. 292, 303 (1993) (holding
8 that application for fees under the EAJA was timely even though
9 the district court's judgment was still appealable); Koch v.
10 United States, 47 F.3d 1015, 1021 (10th Cir. 1995) ("Schaefer
11 therefore makes clear that a plaintiff may ask for attorney's fees
12 even when the time for appeal has not elapsed.").

13 The Federal Defendants' authority to the contrary is
14 inapposite. Of the three cases cited, two provide no support for
15 the conclusion that a request for fees prior to final judgment is
16 premature. See United States v. Section 18, 976 F.2d 515, 521
17 (9th Cir. 1992); Sohappy v. Hodel, 911 F. 1312, 1321 (9th Cir.
18 1990). Section 18 merely cites to Sohappy, which in turn cites
19 the Federal Defendants' third case, Papazian v. Bowen, 865 F.2d
20 1455, 1456 (9th Cir. 1988). In Papazian, the Ninth Circuit found
21 timely an application for fees which was filed before the
22 administrative proceedings on remand were complete. 865 F.2d at
23 1456. In reaching this conclusion, the court described a series
24 of rulings which illustrate its liberal reading of the EAJA,
25 including Auke Bay Concerned Citizen's Advisory Council v. Marsh,
26 779 F.2d 1391, 1393 (9th Cir. 1986), in which the court held that
27 an application for attorneys' fees filed prior to the end of the
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1 period for appeal is timely, as long as the applicant meets the
2 eligibility requirements of 24 U.S.C. § 2412(d)(1)(b). See id.
3 The Federal Defendants' final case is inapplicable because the
4 plaintiff there requested fees in its initial prayer for relief,
5 which the court held did not satisfy the EAJA requirements. See
6 M.A. DeAtley Constr., Inc. v. United States, 71 Fed. Cl. 370, 372
7 n.1 (Fed. Cl. 2006).

8 Thus, if the Organizational Plaintiffs satisfy the conditions
9 for eligibility set forth in the EAJA, they need not wait until
10 the Federal Defendants exhaust their appeal to apply for
11 attorneys' fees and costs. However, the Organizational Plaintiffs
12 have not actually filed an application under the EAJA. In fact,
13 they have stipulated not to do so until the time for an appeal has
14 run because it would be inefficient to litigate the costs and fees
15 prior to that time. See Docket No. 71. Because the ruling that
16 Plaintiffs were entitled to recover costs and fees issued when an
17 application for such recovery had not been filed, the Court now
18 concludes that such ruling was made in error.

19 **B. Eligibility to Recover Costs and Fees**

20 The foregoing conclusion regarding timeliness does not
21 relieve the Organizational Plaintiffs of the burden of proving
22 their eligibility to recover, which they have not satisfied.

23 The Organizational Plaintiffs provided the Court with
24 declarations attesting that they are non-profit organizations.²

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26 ²The City did not participate in the briefing on this motion,
27 and does not argue that it meets any of the EAJA requirements. At
28 a minimum, then, the Court's award of fees and costs to
"Plaintiffs" was in error.

1 See Declaration of Daniel Hirsch; Declaration of Thomas Cochran.
2 Even as non-profit entities, however, the Organizational
3 Plaintiffs must satisfy the size limitations imposed by the EAJA.
4 See 24 U.S.C. § 2412(d)(2)(B)(ii). Neither of the Organizational
5 Plaintiffs has provided any evidence to prove they meet this
6 requirement. That they may have been eligible to apply for fees
7 in litigation which concluded more than a decade ago does not
8 prove that they were eligible at the time they filed this suit.

9 Even if the Organizational Plaintiffs were to establish that
10 they meet the size limitations of the EAJA, the Federal Defendants
11 must be given the opportunity to establish that their position was
12 "substantially justified" or that "special circumstances make an
13 award unjust." 28 U.S.C. § 2412(d)(1)(A). The Organizational
14 Plaintiffs argue that in light of this Court's prior ruling, the
15 Federal Defendants cannot possibly prove that their position was
16 substantially justified. See Opp'n, 8-9. If there were no way
17 for the Government to lose in litigation but prevail on the issue
18 of fees and costs, section 2412(d)(1)(A) would be meaningless.
19 The fact that the Organizational Plaintiffs prevailed at summary
20 judgment is not dispositive of whether the Federal Defendants'
21 position was substantially justified. While the Court is mindful
22 of its previous criticisms of the Federal Defendants' position, it
23 will not deny them the opportunity to prove that position was
24 justified under the totality of the circumstances. See Bullfrog
25 Films, Inc. v. Wick, 959 F.2d 782, 784 (9th Cir. 1992) ("The
26 district court is to take into account the totality of the
27 circumstances in deciding whether the government's position is
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substantially justified."). The Organizational Plaintiffs' authorities confirm the standard that the Federal Defendants must satisfy to show that their position was substantially justified; however, none of those cases suggests that the Court may conclude the position was not justified without hearing the Federal Defendants' argument on the matter. See Gonzales v. Free Speech Coalition, 408 F.3d 613 (9th cir. 2005); Thangaraja v. Gonzales, 428 F.3d 874 (9th Cir. 2005); United States v. \$100,348.00 in U.S. Currency, 354 F.3d 1110 (9th Cir. 2004).³

IV. CONCLUSION

For all of the foregoing reasons, the Court finds that its prior holding that the Plaintiffs are entitled to recover their attorneys' fees and costs was made in error. The Court therefore GRANTS the Federal Defendants' Motion to Alter or Amend Judgment, and ORDERS as follows:

1. The Court's May 2, 2007 Order Granting Plaintiffs' Motion for Summary Judgment (Docket No. 66), is hereby AMENDED to delete in its entirety the following sentence from page 47: "The Court further AWARDS Plaintiffs costs, disbursements, and attorneys'

³In their Opposition Brief, the Organizational Plaintiffs ask the Court to amend the Summary Judgment Order and the Judgment to include an express finding that the Federal Defendants' position was not substantially justified. See Opp'n at 8-9. The Court denies this request. The Organizational Plaintiffs could have filed a properly noticed motion under Rule 59. Their failure to do so violates the local rules governing motion practice. See Civ. L.R. 7-1(a), 7-2(a), 7-2(b). Further, in light of the discussion herein, such a request is improper as it would deny the Federal Defendants the opportunity to argue that their position was substantially justified.

1 fees reasonably expended in their work up to this date which has
2 caused in the instant result."

3 2. The Court's May 3, 2007 Judgment is hereby VACATED.
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5 IT IS SO ORDERED.
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7 Dated: August 15, 2007



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9 SAMUEL A. CONTI
10 UNITED STATES DISTRICT JUDGE
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